Supreme Court, U.S.
FILED
JUL 20 2000
CLERK

No. 99-2036

IN THE

# Supreme Court of the United States

THE GOOD NEWS CLUB, ANDREA FOURNIER and DARLENE FOURNIER,

*Petitioners,*

*v.*

MILFORD CENTRAL SCHOOL,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

FRANK W. MILLER
*Counsel of Record*
NORMAN H. GROSS
MARINA L.C. BOTTONE
FERRARA, FIORENZA, LARRISON,
BARRETT & REITZ, P.C.
*Attorneys for Respondent*
5010 Campuswood Drive
East Syracuse, NY 13057
(315) 437-7600

161035

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

## QUESTION PRESENTED

Whether a School District, which has created a limited public forum on its premises by allowing non-religious youth organizations to use its facilities after school hours and which is empowered to place reasonable restrictions on the content of the speech occurring in its facilities, violates the First and Fourteenth Amendments by excluding a group's intended speech from its facilities on account of the content thereof (which amounts to religious instruction, worship and/or prayer) where the School District has not permitted other groups to use its facilities for similar purposes?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Table of Contents | ii |
| Table of Cited Authorities | v |
| Constitutional Provisions, Statutes and Regulations Involved | 1 |
| Statement of the Case | 2 |
| Reasons for Denying the Writ | 8 |
| I. Review Of The Petition Is Unnecessary Because The Decision Of The Court Below Is Consistent With Precedent Regarding Religious Instruction, Worship And Prayer In The Public School Setting | 8 |
| A. The Second Circuit's Decision is Consistent with This Court's Prior Decisions Regarding Religious Instruction, Worship and Prayer in the Public Schools | 8 |
| 1. The Second Circuit Properly Recognized that There is No Fundamental Right to Free Speech in a Limited Public Forum | 10 |




*Contents*


| | Page |
|---|---|
| 2. The Second Circuit Also Properly Recognized that Respondent is Not Permitted By Education Law Section 414 to Allow Petitioners to Use its Facilities for Religious Instruction, Worship and/or Prayer | 13 |
| B. The Second Circuit's Decision is Consistent with the Equal Access Act | 15 |
| C. The Second Circuit's Decision is Consistent with the New York State Education Law | 16 |
| II. Review Of The Petition Is Unnecessary Because There Is No Disagreement Among The Circuits As To The Proper Application Of The Relevant Constitutional Principles Or The Prior Decisions Of This Honorable Court | 17 |
| A. There is No Disagreement Between the Second and Eighth Circuits as to Whether the Speech of Petitioners' Religious Organization Amounts to Religious Instruction, Worship and/or Prayer | 17 |

*Contents*


*Page*

B. There is No Disagreement Between the Second and Tenth Circuits as to Whether a Government Forum Can Exclude Moral Instruction from a Religious Viewpoint When it Permits Other Kinds of Moral Instruction. ..... 19

C. The Second and Fifth Circuits Do Not Conflict with the Ninth Circuit Over the Proper Application of *Lamb's Chapel*, 515 U.S. 384, 113 S. Ct. 2141 (1993) ..... 20

D. The Second Circuit Does Not Conflict with This Court's Decision in *Lamb's Chapel*, 515 U.S. 384, 113 S. Ct. 2141 (1993), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995) ..... 23

E. The Second Circuit's Decision Does Not Conflict with This Court's Decision in *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981) ..... 25

Conclusion ..... 27

Appendix — Section 414 of the New York State Education Law ..... 1a




## TABLE OF CITED AUTHORITIES


*Page*

**Cases:**

*Board of Education of the Westside Community Schools (Dist. 66), et al. v. Mergens, et al.*, 496 U.S. 226, 110 S. Ct. 2356 (1990) ..... 15

*Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2nd Cir. 1997) ..... 5, 11, 12, 17, 21, 23, 26

*Campbell v. St. Tammany's School Board*, 206 F.3d 482 (5th Cir. 2000) ..... 21, 22

*Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996) ..... 19, 20

*City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997) ..... 4

*Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 105 S. Ct. 3439 (1985) ..... 11, 13

*Deeper Life Christian Fellowship, Inc. v. Board of Education of the City of New York*, 852 F.2d 676 (2nd Cir. 1988) ..... 12, 13, 14, 17

*Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79 (2nd Cir. 1991) ..... 13, 17

*Page*

*Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261 (1962) ..... 9

*Full Gospel Tabernacle, et al. v. Community School District No. 27, et al.*, 979 F. Supp. 214 (S.D.N.Y. 1997), *aff'd*, 164 F.3d 829 (2nd Cir. 1999) ..... 12

*Gentala v. City of Tucson*, F.3d (Nos. 97-17062 and 97-1069), 2000 WL 423460 (9th Cir. 2000) ..... 20, 21, 22

*Good News Club/Good Sports Club v. City of LaDue*, 28 F.3d 1501 (8th Cir. 1994) ..... 17, 18, 19, 26

*Hague v. CIO*, 307 U.S. 496, 59 S. Ct. 954 (1939) ..... 21

*International Society for Krishna Consciousness v. Lee*, 925 F.2d 576 (2nd Cir. 1991), *cert. granted*, 502 U.S. 1022, 112 S. Ct. 855 (1992) ..... 12

*Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384*, 113 S. Ct. 2141 (1993) ..... 17, 20, 21, 23, 25

*Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992) ..... 10

*McCollum v. Board of Education of School District No. 17, Champaign County, Ill.*, 333 U.S. 203, 68 S. Ct. 461 (1948) ..... 8, 9



*Page*

*Quappe v. Endry*, 772 F. Supp. 1004 (S.D. Ohio 1991), *aff'd mem.*, 979 F.2d 851 (6th Cir. 1992) ..... 19

*Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995) ..... 12, 23, 24, 25

*Santa Fe Independent School District v. Doe, et al.*, 530 U.S. __, __ S. Ct. __, 2000 WL 775587 (2000) ..... 10

*Simon & Schuster, Inc. v. Members of the New York State Crimes Victims Board*, 502 U.S. 105, 112 S. Ct. 501 (1991) ..... 11

*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178 (1943) ..... 11

*Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981) ..... 13, 25, 26

*Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428 (1977) ..... 11

**Statutes:**

20 U.S.C. §§ 4071-4074 ..... 15

20 U.S.C. § 4071(c)(5) ..... 15

*Cited Authorities*


| | Page |
|---|---|
| 42 U.S.C. § 1983 | 5 |
| 42 U.S.C. § 2000BB | 5 |
| New York State Education Law Section 414 | 2, 11, 13, 15, 16, 17, 23 |
| **United States Constitution:** | |
| First Amendment | i, 1, 3, 5, 8, 9, 10, 23, 26 |
| Fourteenth Amendment | i, 1, 2, 4, 8, 9 |
| **Rules:** | |
| Fed. R. Civ. P. 46 | 6 |
| Local Rule of Practice 7(1)(a)(3) | 6 |
| Local Rule of Practice Rule 7(f) | 6, 7 |




TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, the Milford Central School District, respectfully requests that this Honorable Court deny Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the Court of Appeals' decision in *Good News Club v. Milford Central School*, 202 F.3d 503 (2nd Cir. 2000), holding that Respondent may deny Petitioners the use of its facilities for holding Club meetings because Petitioners' intended use of said facilities amounts to religious instruction, worship and/or prayer. To that end, Respondent submits this Brief in Opposition to the Petition for Writ of Certiorari and the accompanying lodging containing the deposition transcript of Petitioner, Reverend Fournier.

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

*First Amendment to the Constitution of the United States*:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I (1791).

*Fourteenth Amendment to the United States Constitution*:

> Section 1 of the Fourteenth Amendment provides, in relevant part:
>
> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any

> person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S. CONST. XIV, § 1 (1868).

*New York State Education Law Section 414*:

The entire text of Section 414 of the New York State Education Law is set forth in attached Appendix.

*Milford Central School District Community Use of School Facilities Policy*:

The entire text of the Milford Central School District's Community Use of School facilities Policy is set forth in Appendix D of the Petition.

## STATEMENT OF THE CASE

Section 414 of the New York State Education Law governs the use of school buildings and grounds in New York. In August of 1992, in accordance with Education Law Section 414, the Board of Education of the Milford Central School District (hereinafter, "Respondent") adopted District Policy Number 1500 entitled "Community Use of School Facilities" (hereinafter, "Community Use Policy"). The Community Use Policy provides, in relevant part, that school facilities and grounds may be used for "the purpose of instruction in any branch of education, learning or the arts" (Section 1) and for "holding social, civic and recreational meeting and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public" (Section 3). *See* Petition, Appendix D.



The Community Use Policy also expressly prohibits the use of school premises for religious purposes. More specifically, the Policy provides that:

> *School premises shall not be used by any individual or organization for religious purposes.* Those individuals and/or organizations wishing to use school facilities and/or grounds under this policy shall indicate on a Certification Regarding Use of School Premises form provided by the District that any intended use of school premises is in accordance with this policy.

*See* Petition, Appendix D.

In September of 1996, Respondent received a standard Use of Facilities Request form from the Reverend and Darlene Fournier on behalf of the Good News Club (hereinafter, collectively, "Petitioners"). Petitioners' stated purpose for use of the Respondent's school building was for "singing songs, hearing a Bible lesson and memorizing scripture." This first request was followed by another on September 26, 1996.

On or about October 3, 1996, Respondent's then Superintendent, Robert C. McGruder, Ph.D., denied Petitioners' requests identifying their proposed use of school facilities as "the equivalent of religious worship rather than the expression of religious views on non-secular subject matter."

In January of 1997, Petitioners' counsel sent a letter to Respondent alleging that Respondent's denial of the use of its facilities for the teaching of Bible lessons to elementary students violated Petitioners' rights under the First and

Fourteenth Amendment to the Constitution of the United States.[1]

In response to the fore-mentioned letter, Respondent requested from Petitioners copies of written materials which would be used by Petitioners as part of their lessons, a description of their proposed activities and an indication of who would be leading and/or supervising said activities.

Petitioners provided Respondent with the following general description of their intended activities:

> The Club's activities are run by Ms. Darlene Fournier. The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse[,] the child receives a treat. After attendance, the Club sings songs. Next[,] Club members engage in games that involve, *inter alia*, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.

Petitioners also supplied Respondent with various materials it intended to distribute to children during their sessions. Those materials included, *inter alia*, an invitation to children to attend the meetings; a parental permission slip; and the "Daily Bread," a booklet used by the Good News Club for story telling. The

1. Petitioners also claimed that Respondent's denial of the use of its facilities violated their rights under the Religious Freedom Restoration Act of 1993 but that claim has since become moot in light of the fact that this Honorable Court declared the Act unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997). In addition, Petitioners abandoned their former Equal Protection claims on appeal to the Second Circuit.



letter which accompanied these materials stated that the children who would be participating in the Good News Club are First through Sixth graders.

After a review of the materials submitted by Petitioners, which included, for example, various stories in the "Daily Bread" continually referencing the Lord Jesus Christ, accepting the Lord Jesus as the Savior from sin, believing in the Resurrection and in the descent of the Lord Jesus from Heaven, Respondent properly concluded that the activities proposed by Petitioners were not discussions of secular subjects such as child rearing or the development of character and morals from a religious perspective but that they were the equivalent of religious instruction, worship and/or prayer. Accordingly, Respondent denied Petitioners' request to use its facilities for these purposes.

In February of 1997, Respondent denied Petitioners' subsequent request to use Respondent's facilities during the pendency of *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2nd Cir. 1997).

In March of 1997, Petitioners filed a Summons and Complaint in the United States District Court for the Northern District of New York, pursuant to 42 U.S.C. §§ 1983 and 2000BB, alleging that Respondent violated their constitutional right to free speech under the First Amendment.[2]

On or about March 14, 1997, Petitioners filed a motion for a preliminary injunction to require Respondent to allow Petitioners to use Respondent's facilities to conduct their meetings during the resolution of this matter.

2. As noted in Footnote 1, Petitioners have abandoned their previous claims under the Religious Freedom Restoration Act and the Equal Protection Clause.

In April 1997, Respondent filed its Answer to Petitioners' Complaint.

On April 14, 1997, oral argument was had on Petitioners' motion for a preliminary injunction before the Honorable Thomas J. McAvoy.

On April 17, 1997, Judge McAvoy granted Petitioners' motion permitting them to use Respondent's facilities pending the resolution of the instant matter.

In August 1998, both parties moved for summary judgment in their favor.

In September 1998, the parties stipulated to the facts of the case and agreed that the case involved only questions of law.[3]

---

3. However, it should be noted that Petitioners' improperly raised an issue for the first time while on appeal to the Second Circuit. Petitioners filed a Statement of Material Facts pursuant to Rule 7(1)(a)(3) of the Local Rules of Practice in the United States District Court for the Northern District of New York (hereinafter, "Rules of Practice"). This Statement is commonly known as a "Rule 7(f) Statement." Respondent in turn filed its own Rule 7(f) Statement controverting a major portion of the Petitioners' Rule 7(f) Statement. Petitioner then filed a second Rule 7(f) Statement contradicting Respondent's Rule 7(f) Statement. Respondents did not file a second Rule 7(f) Statement. Petitioners claimed *for the first time on appeal* that Respondent's failure to file a second Rule 7(f) Statement deemed that the facts alleged in their second Rule 7(f) Statement were deemed true. Petitioners now attempt to make this same argument to this Court.

It is well-settled that consideration of an Appeal is confined to the facts contained in the record and will consider nothing which does not appear therein. Fed. R. Civ. P. 46. Because Petitioners did not argue that Respondent "admitted" the facts contained in their second Rule 7(f) Statement at the District Court level, they were precluded from doing so on Appeal to either the Second Circuit or to this Court.

(Cont'd)



They agreed to remove the case from the trial calendar pending the outcome of the parties' respective motions for summary judgment.

On October 23, 1998, Judge McAvoy granted Respondent's summary judgment motion and denied that of Petitioners.

On October 30, 1998, Petitioners appealed Judge McAvoy's ruling to the Court of Appeals for the Second Circuit.

Oral Argument was had on Petitioners' appeal on June 23, 1999. The Second Circuit affirmed the lower Court's decision on February 3, 2000.

---

(Cont'd)

Even if Petitioners were not so precluded, the Rules of Practice do not require what Petitioners suggest. The Rules of Practice require that a moving party file a Rule 7(f) Statement with its motion for summary judgment. The Rules of Practice permit the non-moving party to file a responsive Rule 7(f) Statement if there are facts contained in the moving party's Rule 7(f) Statement which the non-moving party contests. The Rules of Practice do not, however, require that a moving party file a second Rule 7(f) Statement in response to that filed by a non-moving party or that a non-moving party file a second Rule 7(f) Statement in response to a second Rule 7(f) Statement filed by the moving party. To read the Local Rule of Practice as Petitioners suggest would lead to a result which cannot have been intended by the District Court — to require or even permit opposing parties in a motion to file numerous and/or unlimited Rule 7(f) Statements.

In addition, Respondent's Rule 7(f) Statement clearly disputed those "facts" set forth in Petitioners Rule 7(f) Statement.

Further, Petitioners' Rule 7(f) Statement also contained legal conclusions which are not permitted by the Rules of Practice to be included therein.

Finally, the District Court made specific findings which rejected the facts as set forth in Petitioners' Rule 7(f) Statement.

Petitioners' request to the Second Circuit for rehearing en banc was denied on March 21, 2000.

In June 2000, Petitioners' filed a Petition for a Writ of Certiorari with this Honorable Court.

## REASONS FOR DENYING THE WRIT

## I.

## REVIEW OF THE PETITION IS UNNECESSARY BECAUSE THE DECISION OF THE COURT BELOW IS CONSISTENT WITH PRECEDENT REGARDING RELIGIOUS INSTRUCTION, WORSHIP AND PRAYER IN THE PUBLIC SCHOOL SETTING

### A. The Second Circuit's Decision is Consistent with This Court's Prior Decisions Regarding Religious Instruction, Worship and Prayer in the Public Schools

It is well-settled that religious instruction conducted in public schools during the hours of mandatory instruction violates both the First and Fourteenth Amendments to the Constitution of the United States. In *McCollum v. Board of Education of School District No. 17, Champaign County, Ill.*, 333 U.S. 203, 68 S. Ct. 461 (1948), the State of Illinois had a statute which permitted its school districts to release children between the ages of seven and sixteen from their regular secular education classes to attend classes in religious instruction in public school buildings. *Id.* at 204, 462. This Court found that the statute and the facts of the case supported the conclusion that the State's compulsory education system impermissibly assisted and was integrated with the religious instruction carried on by separate religious sects on tax-supported property. *Id.* at 209, 464. Accordingly, this Court held that the State's statute violated both the First and Fourteenth Amendments. *Id.* at 204, 462.



In the case at bar, Petitioners intend to conduct a program of religious instruction, worship and/or prayer for Christians on tax-supported public property — the facilities owned and operated by Respondent. The fact that the proposed religious instruction, worship and/or prayer is planned for a time frame *immediately following* that dedicated for secular instruction, as opposed to a time frame within that dedicated for secular instruction as in *McCollum*, does not diminish the fact that Petitioners' intended use of Respondent's facilities violates the First and Fourteenth Amendments by forcing Respondent to endorse Christianity over all other religions and over no religion at all.

Moreover, this Court has long viewed public schools as a special environment in need of certain protections, including the banning of government-initiated prayer therein. In *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261 (1962), the Respondent Board of Education directed the School District's Principal to cause the following prayer to be said aloud each day in each class:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our Country. *Id.* at 422, 1262.

This Court found that the School District violated the Establishment Clause of the First Amendment by requiring that the foregoing prayer be recited at the beginning of each school day. *Id.* at 424, 1264.

Although the recitation of this daily prayer occurred during the school day, while the prayer proposed by Petitioners would occur immediately following the school day, Respondent maintains that this fact is not dispositive, especially in light of the fact that this Court has also banned government-initiated

prayer at non-instructional activities occurring outside regular school hours.

In *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992), a middle school student objected when the Respondent School District invited a member of the clergy to give an invocation and benediction at her middle school graduation. *Id.* at 581, 2652. Recognizing, as it has consistently done in the past, that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary schools" and "that prayer exercises in public schools carry a particular risk of indirect coercion" (*Id.* at 592, 2658), this Court found that the School District's actions violated the Establishment Clause of the First Amendment.

This Court has issued a similar holding even where prayer at non-instructional events is student-initiated, student-led, nonsectarian and nonprostelyzing. In *Santa Fe Independent School District v. Doe, et al.*, 530 U.S. __, __ S. Ct. __, 2000 WL 775587 (2000), this Court invalidated two of the School District's policies permitting students to vote to determine whether a student would deliver a prayer at varsity football games and to select which student would deliver said prayer. *Id.* at 14.

### 1. The Second Circuit Properly Recognized that There is No Fundamental Right to Free Speech in a Limited Public Forum

While the First Amendment of the United States Constitution prohibits Congress from making any law abridging the freedom of speech, that freedom is not absolute and may be limited in a variety of ways. For example, the content of speech may be regulated if necessary to serve a compelling state interest and where the means utilized to achieve that end are narrowly



tailored. *Simon & Schuster, Inc. v. Members of the New York State Crimes Victims Board*, 502 U.S. 105, 112 S. Ct. 501 (1991). Similarly, content-neutral restrictions, such as time, place and manner restrictions, may be imposed on speech. Additionally, the freedom not to speak is protected constitutionally. *See, for example, West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178 (1943); and *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428 (1977).

The parties herein have stipulated, and the Second Circuit has affirmed, that Respondent has created a limited public forum, pursuant to N.Y. Education Law Section 414, on its property by permitting youth groups such as the Boy Scouts, Girl Scouts and the local Little League to use its facilities. The parties have also stipulated that some of these groups may attempt to promote the moral and character development of children.

"Limited public forums" are those which have been designated by government as a "place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Bronx Household*, at 211, *quoting Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 802, 105 S. Ct. 3439, 3449 (1985).

In *Bronx Household*, a Church and its Pastors brought an action against a School District and its officials challenging the District's refusal to allow the Church to use its public Middle School Auditorium for weekly religious worship. The Second Circuit held that a public school was a limited public forum. *Id.* at 211-213. The Court also held that the School District's policy of excluding religious services at school was reasonable and viewpoint neutral. *Id.* at 214-215. The Court opined:

> *There is no fundamental right of freedom of speech in a limited forum from which various types of*

> *speakers and subjects are properly excluded. Nor is the free exercise of religion a fundamental right in a properly limited public forum*. It is only when a traditional public forum "is opened up to assembly or speaking by some groups [that] government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Id.* at 217 [citations omitted] [*emphasis added*].

Accordingly, "[r]estrictions on speech in a limited public forum will withstand First Amendment challenge if they are reasonable and viewpoint neutral." *The Good News Club, et al. v. Milford Central School,* 202 F.3d 502, 509 (2nd Cir. 2000), *quoting Rosenberger v. Rector & Visitors of the University of Virginia,* 515 U.S. 819, 829-830 (1995); and *Bronx Household*, at 214.

Thus, the Second Circuit's decision in this matter and in *Bronx Household* properly reinforce prior decisions of the Second Circuit, as well as this Court, permitting government officials to regulate speech occurring in limited public forums. *See, for example, Deeper Life I* [where the Second Circuit held that, under the limited public forum doctrine, government property remains a non-public forum as to all unspecified uses and exclusions of uses]; *International Society for Krishna Consciousness v. Lee*, 925 F.2d 576, 580 (2nd Cir. 1991), *cert. granted*, 502 U.S. 1022, 112 S. Ct. 855 (1992) [where the Second Circuit held that any regulation of expressive activity in a non-public forum need only be reasonably related to a legitimate governmental concern]; and *Full Gospel Tabernacle, et al. v. Community School District No. 27, et al.*, 979 F. Supp. 214 (S.D.N.Y. 1997), *aff'd*, 164 F.3d 829 (2nd Cir. 1999) [where the Second Circuit held that the fact that a School District gave its permission to use its facilities for religious worship on two prior occasions did not mean that the District has opened its limited public forum for future religious worship].



*See also Cornelius*; and *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981).

**2. The Second Circuit Also Properly Recognized that Respondent is Not Permitted By Education Law Section 414 to Allow Petitioners to Use its Facilities for Religious Instruction, Worship and/or Prayer**

Respondent is not permitted by Section 414 of the Education Law (or Respondent's Community Use Policy), to allow Petitioners to use its facilities for religious purposes. The Second Circuit has agreed.

In *Deeper Life Christian Fellowship, Inc. v. Sobol* [*Deeper Life II*], 948 F.2d 79 (2nd Cir. 1991), the Second Circuit opined:

> We follow our opinion in *Deeper Life I* in holding that under § 414, "access to the school property is limited only where it serves the interests of the public in general rather than that of sectarian groups. . . ." The prior panel did not construe the statute as giving *any* discretion — bridled or unbridled — with respect to the granting of use permits to religious groups: such permits simply may not be issued. Moreover, as the panel pointed out, "the regulations governing the use of school premises expressly exclude fundraising for, teaching tenets of, or distributing material promoting a particular religion."

*Id.* at 83 [*emphasis in original*].

Further, the purpose of Education Law Section 414 is to promote *general knowledge*, not the type of knowledge Petitioners intend to promote during their religious instruction sessions. In *Deeper Life I*, the Second Circuit observed:

> Nor are the activities of the Deeper Life church really similar to those purposes enumerated in section 414,

as [Deeper Life] argues. The subdivisions of the statute and the Commissioner's decisions . . . interpreting those provisions demonstrate . . . that access to the school property is permitted only where it serves the interests of the public in general, rather than that of sectarian groups. [Deeper Life] argues that because its services are open to the general public, this meets the requirements of section 414. It seems clear, however, that the church's activities are primarily for its own benefit. . . . And while [Deeper Life] argues that it should come under section 414(1)(a)'s provision that opens the schools "[f]or the purpose of instruction in any branch of education, learning or the arts," *the thrust of the statute is to promote general knowledge, rather than to promote a forum for proselytizing or indoctrinating the public in a particular group's beliefs*.

*Id.* at 680 (*emphasis added*).

Petitioners herein do not intend to promote general knowledge; they do, however, admittedly seek a forum to proselytize and indoctrinate elementary school-aged children into the beliefs of Christianity. Even a cursory review of the Request Form submitted by Petitioners establishes that they intend to use Respondent's facilities for religious purposes (*i.e.: religious instruction, worship and prayer*). Recall that they asked to use the facilities for "**singing songs, *hearing Bible lesson[s] and memorizing Scripture***."

Clearly, this Court has reviewed with caution any attempts made by various religious and governmental entities to engage in religious instruction, worship and/or prayer in the public school setting.



Respondent respectfully maintains that the decision of the Second Circuit in the case below, as well as in other related cases, establishes that the Second Circuit has properly interpreted this Court's decisions concerning the establishment of limited public forums and the fact that there is no fundamental right to free speech in a limited public forum. Further, the Second Circuit has properly applied the provisions of Education Law Section 414 to determine that Petitioners' intended use of Respondent's facilities is not in accordance with same.

### B. The Second Circuit's Decision is Consistent with the Equal Access Act

Congress has declined to allow student-initiated and student-led prayer groups in the public elementary school setting although it has allowed these groups in the secondary school setting. In 1984, Congress enacted the Equal Access Act (20 U.S.C. §§ 4071-4074) (hereinafter, the "Act") to allow students in public secondary schools to initiate Bible clubs and conduct prayer groups on school premises during non-instructional time. *See also Board of Education of the Westside Community Schools (Dist. 66), et al. v. Mergens, et al.*, 496 U.S. 226, 110 S. Ct. 2356 (1990) (upholding the Act).

Notably, Congress limited the scope of this legislation to secondary school-aged children. Presumably, Congress was well aware of the fact that children enrolled in elementary schools are far more impressionable than those enrolled in secondary schools and that the former could not easily distinguish, if at all, between school-sponsored religious activities and private speech. If this were not the case, Congress would have specified that this legislation was applicable to all public school students.

Furthermore, the Act makes clear that "nonschool persons may not direct, conduct, control, or regularly attend activities of student groups." 20 U.S.C. § 4071(c)(5). Thus, even where

secondary students do meet, Congress was sensitive to the fact that outsiders such as clergy should not lead, or even regularly attend, these meetings.

Respondent respectfully submits that Petitioners have completely disregarded both the Equal Access Act itself and the Congressional intent behind it in demanding that Respondent permit them to conduct their weekly religious instruction, worship and/or prayer meetings on its premises.

### C. The Second Circuit's Decision is Consistent with the New York State Education Law

Section 414 of the New York State Education Law specifically delineates the purposes for which school houses, school grounds and other school property may be used. More specifically, the law provides that:

> 1. . . . . The trustees or board of education may adopt reasonable regulations for the use of . . . schoolhouses, grounds or other property . . . for any of the following purposes:
>
> * * *
>
> [d] For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; *but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination. . . .*

N.Y. Education Law § 414 (*emphasis added*). *See also* attached Appendix.



The list of permitted uses set forth in Education Law Section 414 does not include meetings for religious purposes. In fact, the law expressly prohibits meetings which benefit a religion.

Although Education Law Section 414 has been the subject of review a number of times, no Court, including this one, has ever declared its purposes or language unconstitutional. *See, for example, Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384,* 113 S. Ct. 2141 (1993); *Deeper Life Christian Fellowship, Inc. v. Board of Education of the City of New York (Deeper Life I)*, 852 F.2d 676 (2nd Cir. 1988); *Deeper Life Christian Fellowship, Inc. v. Sobol (Deeper Life II)*, 948 F.2d 79 (2nd Cir. 1991); and *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2nd Cir. 1997).

Respondent respectfully submits that both its Community Use Policy, and its application thereof, are in complete accordance with Education Law Section 414 in that they prohibit the use of Respondent's facilities for religious purposes.

## II.

## REVIEW OF THE PETITION IS UNNECESSARY BECAUSE THERE IS NO DISAGREEMENT AMONG THE CIRCUITS AS TO THE PROPER APPLICATION OF THE RELEVANT CONSTITUTIONAL PRINCIPLES OR THE PRIOR DECISIONS OF THIS HONORABLE COURT

### A. There is No Disagreement Between the Second and Eighth Circuits as to Whether the Speech of Petitioners' Religious Organization Amounts to Religious Instruction, Worship and/or Prayer

In *Good News Club/Good Sports Club v. City of LaDue*, 28 F.3d 1501 (8th Cir. 1994), the School District prohibited the Club from meeting in its facilities within a certain time frame (from 3:00 to 6:00 PM in the evening). Assuming that the

District was engaging in viewpoint discrimination, as opposed to content-based discrimination, the Eighth Circuit ruled that the Respondent School District unlawfully discriminated against the Club on account of its viewpoint.

Notably, Senior Circuit Judge Bright filed a strong dissent in the case:

> The majority opinion in this case . . . seizes on a single claim made by the plaintiffs that the school policy results in viewpoint discrimination against the Club. That conclusion is reached by ignoring Judge Filippine's careful and detailed findings of fact, misconstruing the factual record made in the case and thereafter attempting to apply the precedent of *Lamb's Chapel v. Center Moriches School District*, . . . to reach its conclusion. Because *Lamb's Chapel* does not control on the facts of this case, the majority reaches an erroneous result. *Id.* at 1511 [citations omitted].

Judge Bright went on to criticize the majority for "judicial activism which has no warrant under existing law." *Id.* at 1511-1512. He concluded that all that was necessary to decide the issue was a broad review of the reasonableness of the School District for amending its policy. Once that was found to be reasonable, there was no reason to interfere with the School District's decision. *Id.* at 1513-1515.

As the Second Circuit correctly pointed out, the Eighth Circuit "apparently took for granted that the Good News/Good Sports Club's activities amounted only to speaking on moral and character development." *Good News v. Milford*, at 511. As Judge Bright pointed out in his dissenting opinion, the Eighth Circuit did not delve deeply into the facts of its case. Had the Eighth Circuit examined the actual content of the Club's



meetings, as did the Second Circuit, the Eighth Circuit would have been compelled to come to the same conclusion as the Second Circuit — that the Club's activities go far beyond teaching moral and character development from a religious viewpoint.

Further, the Eighth Circuit's case dealt with secondary school-aged children, not elementary school-aged children as did the case before the Second Circuit. Notably, the Eighth Circuit itself expressed a concern for elementary school-aged children by citing in its decision *Quappe v. Endry*, 772 F. Supp. 1004, 1011-1012 (S.D. Ohio 1991), *aff'd mem.*, 979 F.2d 851 (6th Cir. 1992), and distinguishing between children aged five to ten years, from those in *Good News Club v. LaDue* aged eleven through fifteen years. Because the Second and Eighth Circuits have not addressed the same issues, they are not in disagreement with respect to same.

### B. There is No Disagreement Between the Second and Tenth Circuits as to Whether a Government Forum Can Exclude Moral Instruction from a Religious Viewpoint When it Permits Other Kinds of Moral Instruction

In *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), the City of Albuquerque had in place a policy which prohibited religious instruction at its City-owned senior center. *Id.* at 1277. A local church requested that the City permit the church to show a film entitled "Jesus" at the senior center. The film contained an invitation to its viewers to accept Jesus Christ as their savior. *Id.* The City denied the church's request. The Tenth Circuit held that the City's decision amounted to viewpoint discrimination and found in favor of the church. *Id.* at 1279.

The case at bar is primarily distinguishable from *Church on the Rock* for the same reasons that it is distinguishable from *Good News Club v. LaDue*. First, the case at bar is concerned

with restrictions placed on speech on account of its content while *Church on the Rock* was concerned with viewpoint discrimination. Second, the audience in *Church on the Rock* was comprised of adults, more specifically, senior citizens, while the audience at Petitioners' meetings are captive elementary school-aged children. Quite obviously, senior citizens can more easily discern private from public speech than can elementary-aged children. Furthermore, senior citizens are free to leave a film screening if they find the religious views expressed therein distasteful; elementary school-aged children may not freely leave a Club meeting. Finally, the City in *Church on the Rock* had previously opened its doors for other religious presentations while the Respondent herein has not. Because the Tenth Circuit has not issued an opinion on issues even remotely resembling those reviewed by the Second Circuit, the two cannot be in disagreement as to those issues.

### C. The Second and Fifth Circuits Do Not Conflict with the Ninth Circuit Over the Proper Application of *Lamb's Chapel*, 515 U.S. 384, 113 S. Ct. 2141 (1993)

In *Gentala v. City of Tucson*, F.3d (Nos. 97-17062 and 97-1069), 2000 WL 423460 (9th Cir. 2000), the City of Tucson rejected the Gentala's application for coverage of the costs of City services for a local observance of the National Day of Prayer which was held in one of the City's public parks because the Fund prohibited the support of religious organizations. *Id.* at 1. The Ninth Circuit held that City's denial amounted to impermissible viewpoint discrimination.

Even a cursory review of the facts of *Gentala* establishes that the Ninth Circuit did not review the issues now before this Court. First, the *Gentala* Court determined that the City's denial of access to the Fund amounted to viewpoint discrimination while the case at hand clearly involves a content-based restriction. In addition, *Gentala* dealt solely with a denial of



monies from a civic events fund, not religious instruction, worship, prayer and indoctrination involving elementary school-age children. Further, the activities in *Gentala* took place in a public park, a prime example of a traditional public forum (*see Hague v. CIO*, 307 U.S. 496, 59 S. Ct. 954 (1939)), while the activities in this case are intended for an elementary school. Moreover, the participants in the activities in *Gentala* were free to both meander around the public park, tuning in and out of the speech occurring there, while the young students in this case are a captive audience. Finally, the Court in *Gentala* relied on the fact that the Fund in issue was expressly established for civic purposes. Conversely, Respondent herein was established for educational purposes. Clearly then, the Ninth Circuit has not rendered an opinion on content-based discrimination in an elementary school setting; therefore, there is no disagreement between the Ninth and the Second Circuits as the proper application of *Lamb's Chapel*.

In *Campbell v. St. Tammany's School Board*, 206 F.3d 482 (5th Cir. 2000), the School District had a community use policy, almost identical to that of Respondent, which prohibited the use of its facilities for religious services and/or instruction. *Id.* at 484. The District denied the use of its facilities to the Louisiana Christian coalition for a prayer meeting which included, *inter alia*, religious prayer and instruction. *Id.* The Fifth Circuit, relying on the decision of the Second Circuit in *Bronx Household*, held that the District's denial was a permissible content-based regulation in its limited public forum. *Id.* at 487.

The Fifth Circuit and the Second Circuit have both properly recognized a distinction between permissible discrimination based on *content* and impermissible discrimination based on *viewpoint*. Acknowledging the fact that *Lamb's Chapel* declared the exclusion of a meeting on a permissible subject because of

the speaker's religious *viewpoint* to be unconstitutional, the Fifth Circuit observed:

> *This does not mean that any ban on religious activities amounts to viewpoint discrimination. Religion may be either a perspective on a topic such as marriage or may be a substantive activity in itself. In the latter case, the government's exclusion of the activity is discrimination based on content, not viewpoint.*
>
> The *Bronx Household* court held that religious services and religious instruction are activities which may be excluded as content-based discrimination. We agree, finding that religious services and instruction are not simply approaches to a topic, but activities whose primary purpose is to teach and experience the subject of religion. These are activities distinct from a topical discussion, a social gathering, or a political meeting. The District has excluded such religious activities but does not forbid speakers on general topics with a religious perspective – a distinction that viewpoint neutrality permits.

*Id.* (citation omitted) (*emphasis added*).

For the same reasons that the Second Circuit's decision in this matter can easily be distinguished from the Ninth Circuit's decision in *Gentala*, the Fifth Circuit's decision in *Campbell* can just as easily be distinguished — *Gentala* dealt with Viewpoint discrimination while *Campbell* dealt with content-based discrimination. Thus, the Fifth and the Ninth Circuit are not in disagreement as to the issues now before the Court.



### D. The Second Circuit Does Not Conflict with This Court's Decision in *Lamb's Chapel*, 515 U.S. 384, 113 S. Ct. 2141 (1993), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995)

In *Lamb's Chapel*, 515 U.S. 384, 113 S. Ct. 2141 (1993), the School District denied the requests of a local evangelical church to use its facilities to show a six-part film series on the topic of child rearing from a Christian perspective. *Id.* at 387-388, 2144-2145. The School District relied on its community use policy which was enacted pursuant to Section 414 of the New York Education Law. Finding that the District's exclusion of the Church under the circumstances presented in that case amounted to impermissible viewpoint discrimination, this Court found the District's actions to be in violation of the Church's First Amendment rights.

The Second Circuit's decisions in *Bronx Household* or in the case at bar are not contrary to this Court's holding in *Lamb's Chapel*. In *Lamb's Chapel*, this Court was concerned with impermissible *viewpoint* discrimination. In both *Bronx Household* and this case, the Second Circuit was concerned with permissible *content-based* discrimination in public school settings. As the Second Circuit properly noted, in the case below, Petitioners' intended use of Respondent's facilities goes beyond the teaching of moral values from a Christian perspective:

> Though such teachings may involve secular values such as obedience or resisting jealousy, the Christian viewpoint, as espoused by Reverend Fournier, contains an additional layer:
>
> > [T]hese moral or these values are senseless without Christ, that's to the children who know Christ as Savior, we

> would say, you know you cannot be jealous because you know you have the strength of God. To the children who do not know Christ, we would say, you need Christ as your Lord Savior so that you might overcome these, you know, feelings of jealousy.
>
> * * *

The activities of the Good News Club do not involve merely a religious perspective on the secular subject of morality. The Club meetings offer children the opportunity to pray with adults, to recite biblical verse, and to declare themselves "saved." The Club argues that these practices are necessary because its viewpoint is that a relationship with God is necessary to make moral values meaningful. *Even accepting that this precept is a viewpoint on morality and not a religious principle, it is clear from the conduct of the meetings that the Good News Club goes far beyond merely stating its viewpoint. The Club is focused on teaching children how to cultivate their relationship with God through Jesus Christ. Under even the most restrictive and archaic definitions of religion, such subject matter is quintessentially religious. Good News Club v. Milford*, at 509-510 [citations omitted] [*emphasis added*].

In *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995), a college student organization was denied college funding for the publication of a Christian periodical entitled "Wide Awake." *Id.* at 825-827, 2514-2516. The periodical contained several challenges to readers to accept Jesus Christ as their savior and to establish a relationship with Him. *Id.* at 865-867, 2534-2535. This Court



held that the invitation to college students to accept Jesus Christ as their savior did not amount to religious instruction.

Contrary to the assertions of Petitioners, the case at bar is readily distinguishable from *Rosenberger*. Primarily, the readers of the periodical in *Rosenberger* were college-aged adults, not elementary school-aged children. Second, challenging adults who read a periodical at their leisure is far different than challenging a captive audience of elementary school-aged children to come forward and accept Christ. Third, Petitioners set up and conduct their meetings similar to the way a class in school is conducted. The sessions, which have all the imprimatur of the school, stress religious beliefs: beliefs in Jesus Christ and other religious teachings. These facts clearly distinguish reading a newspaper from attending Petitioners' meetings.

Respondent respectfully submits that the Second Circuit's decisions do not conflict with those of this Court in either *Lamb's Chapel* or *Rosenberger*. In fact, they are in complete accordance with same.

### E. The Second Circuit's Decision Does Not Conflict with This Court's Decision in *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981)

In *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981), the University of Missouri at Kansas advised a religious student group that it could no longer use its facilities for its regular meetings because the University's Board of Directors had adopted a policy prohibiting the use of University facilities for religious worship and/or instruction. *Id.* at 272, 265. Because this Court determined that the University had created a designated public forum, the Court pointed out that the University had to satisfy the standard of review applicable to content-based discrimination — "[i]t must show that its regulation is necessary to serve a compelling state interest and

that it is narrowly drawn to achieve that end." *Id.* at 274, 270. This Court ultimately held that the University's action violated the students' First Amendment rights.

The Second Circuit's decision complies with the standards set forth above. In the case below, the Second Circuit observed that "it is a proper state function to decide the extent to which church and school should be separated in the context of the use of school premises." *Good News Club v. Milford,* at 509 [citation omitted]. Relying on its prior decision in *Bronx Household,* the Second Circuit reasoned that:

> It "is not difficult for school authorities to make" the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer.
>
> Although other cases may present difficult questions of line-drawing, we believe that the school authorities [in the case at bar], after thorough inquiry and deliberation, correctly determined that the activities of the Club fall clearly on the side of religious instruction and prayer. *Id.* at 510 [citation omitted].

Therefore, contrary to the allegations of Petitioners, the Second Circuit had not delved into the *significance* of speech in a University setting in arriving at its decisions; it has instead focused on the *existence* of the speech itself in public elementary schools. Nor has the Second Circuit resisted the development of objective guidelines for use by government officials in determining when the presentation of morals from a religious perspective crosses the line and becomes religious instruction; the Court made it clear that the distinction is one easily made and, therefore, such guidelines are not necessary.



Also worth noting at this point is the fact that, if either the Second or the Fifth Circuit had concluded that the respective Districts involved were *not* empowered to review proposed speech for appropriateness in the public schools, the Districts effected thereby would in essence be required to open their doors to all religious activity including, *inter alia*, religious services. This result cannot be the intent of this Court.

## CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

FRANK W. MILLER
*Counsel of Record*
NORMAN H. GROSS
MARINA L.C. BOTTONE
FERRARA, FIORENZA, LARRISON,
BARRETT & REITZ, P.C.
*Attorneys for Respondent*
5010 Campuswood Drive
East Syracuse, NY 13057
(315) 437-7600

# APPENDIX

## APPENDIX — SECTION 414 OF THE NEW YORK STATE EDUCATION LAW

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED EDUCATION LAW
CHAPTER 16 OF THE CONSOLIDATED LAWS
TITLE I—GENERAL PROVISIONS
ARTICLE 9—SCHOOL BUILDINGS AND SITES
Corp. C West Group 2000. All rights reserved.
Current through L.1999, c. 659

Section 414. Use of schoolhouse and grounds

1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; except, however, in the city of New York each community school board shall be authorized to prohibit any use of schoolhouses and school grounds within its district which would otherwise be permitted under the provisions of this section. Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the

use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

(b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.



(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

(f) For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civil forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during non-school hours, or to provide child care services during school hours for the children of pupils attending the schools of the district and, if there is additional space available, for children of employees of the district. Such determination shall be made by each district's board of education, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social services district as authorized by law; or by any other public or private voluntary source or any combination thereof.

(j) For graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

(k) The board of education in the city of New York may delegate the authority to judge the appropriateness for uses other than school purposes to community school boards.

2. The trustees or board of education shall determine the terms and conditions for such use which may include rental at least in an amount sufficient to cover all resulting expenses





for the purposes of paragraphs (a), (b), (c), (d), (e), (g), (i) and (j) of subdivision one of this section. Any such use, pursuant to paragraphs (a), (c), (d) and (h) of subdivision one of this section, shall not allow the exclusion of any district child solely because said child is not attending a district school or not attending the district school which is sponsoring such use or on which grounds the use is to occur.